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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDRES GARCIA,

Defendant and Appellant.

B292363

(Los Angeles County
Super. Ct. No. TA143368)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael Shultz, Judge. Modified and, as so modified, affirmed.

Marilee Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Nancy Lii Ladner, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Andres Garcia of the first degree murder of his long-time girlfriend. Garcia appeals, contending the evidence was insufficient to prove the murder was premeditated and deliberate. In supplemental briefing, he contends the trial court violated his due process rights by imposing a restitution fine and two assessments without first determining that he had the ability to pay. We disagree with Garcia's first contention and conclude he has forfeited his second. We order a \$500 domestic violence fund fee stricken, and in all other respects, affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts*

a. *People's evidence*

Garcia and the victim, Claudia Moya, dated off-and-on for approximately 11 years. For the last 10 years of their relationship, they lived in a detached, converted garage located at the back of a residence occupied by Moya's family members, including her grandfather, her niece Martha Zamora,¹ and Zamora's daughter. The couple had a young son, D., who was approximately 10 years old at the time of the murder.

Beginning in approximately November 2016, Moya and D. began sleeping in the main house, apart from Garcia, who continued sleeping in the garage. Zamora noticed that during this period, it appeared the relationship between Moya and Garcia had changed. They were not going out together "like a family," and Moya began going out with her friends, sometimes staying out overnight. The couple sometimes argued, raising their voices at each other.

¹ Although she was Moya's niece, Zamora viewed Moya as a sister.

On the evening of May 28, 2017, Zamora heard Moya and Garcia arguing in the living room, and then Moya left the house to go out with her friends. A neighbor, Elizabeth Sibrian, also heard them arguing. She saw that when Moya got into her red Ford Expedition, Garcia stood next to the driveway gate, looking angry. Sibrian left to run errands at the same time Moya departed. When Sibrian returned, Garcia was “hiding in the shadows” in the front yard. He was “sitting on the porch . . . in total darkness.” He remained on the porch for approximately an hour and a half, sitting, standing, pacing, and rocking back and forth.

Zamora awoke at approximately 7:00 a.m. the next morning, and went to check on D., who was sleeping in the living room. D. was still asleep, but Garcia was sitting silently on the living room couch. He did not speak to her and was not doing anything. Moya was not yet home. At approximately 7:15 a.m., David Cuellar, who lived next door to Moya’s residence, took his cat outside. He observed Garcia standing behind a blue truck at the residence, drinking from a paper bag. Cuellar said “good morning” to Garcia, but received no reply. Garcia remained outside for 15 to 20 minutes. Zamora checked on D. again at approximately 8:00 a.m. D. was still asleep, and Garcia was again sitting in the same place in the living room, apparently doing nothing. Moya was still not home. Zamora returned to her bedroom, where her daughter was. When D. woke up, Garcia was still sitting on the couch.

At approximately 9:10 a.m., Moya returned home. She pulled her Expedition into the driveway and shut the driveway gate behind her. She and D. greeted each other, and she asked D. what he wanted for breakfast. The two of them briefly

discussed where to eat. D. noticed that Garcia was no longer in the living room.

Suddenly, Garcia came from behind Moya with a large butcher knife, and stabbed her side. He then turned her around and stabbed her in the stomach. Moya and D. began screaming.

Alerted by Moya's screams, Zamora ran into the hallway to find Moya lying on the floor, with Garcia standing over her, stabbing her in the chest. Zamora tried to take the knife from Garcia, but was unsuccessful. Garcia said nothing to Zamora. Zamora ran to the kitchen to call for help, but the phone was dead. She returned to the hallway, where Garcia was still stabbing Moya. Zamora unsuccessfully attempted to pull Garcia away from Moya by pulling his arm, cutting her hand in the process when Garcia pushed her away. Garcia continued stabbing Moya, and still said nothing. Zamora ran to her bedroom, locked her daughter inside to keep her safe, and tried to call for help on her cellular telephone. However, she was unable to call because her hands were slippery with blood. She returned to the hallway and struggled with Garcia a third time, trying to stop his attack. Garcia looked at Zamora, who was holding the cell phone. He dropped the knife, went outside, slammed the driveway gate open, and got in Moya's Expedition.

During the attack on his mother, D. ran back and forth in the living room, screaming. Eventually he ran to the front yard "so [he] could breathe." Neighbors heard him screaming, " 'He killed my mommy' " and " 'My dad is killing my mom.' " One of the neighbors called 911.

When Garcia left the house, Zamora followed, afraid he was planning to take D. Cuellar, having heard the screams, hurried to the Moya residence to provide assistance, but Garcia was

already headed to the Expedition in the driveway. Zamora told him Garcia had stabbed Moya. Cuellar unsuccessfully attempted to close the driveway gate and pull Garcia from the car. Garcia sped out of the driveway and drove off in a reckless fashion. Footage from video surveillance cameras located nearby showed that the time between Moya's arrival and Garcia's departure was approximately six minutes.

Zamora returned to Moya and performed cardiopulmonary resuscitation. Paramedics and sheriff's deputies arrived shortly thereafter. Moya was pronounced dead at the scene.

An autopsy revealed that she had been stabbed 23 times, including numerous wounds to her back, chest, torso, abdominal region, head, face, and neck. Three of the wounds would have been rapidly fatal. Her injuries included a six-inch deep, four- and one-quarter inch long stab wound to her shoulder; a six-inch deep, one- and three-quarters inch long wound that pierced her lung; a "large gaping" wound to her neck, two- and one-quarter inches long and up to three and one-half inches deep; and a wound to her lower back that penetrated her kidney and aorta. She also had six defensive wounds on her hands and arm.

A California Highway Patrol officer apprehended Garcia, driving Moya's Expedition, near Oxnard, later that day.

The butcher knife Garcia used to commit the murder was the largest of the seven knives the family kept in the kitchen.

b. Defense evidence

Garcia testified on his own behalf, as follows. He and Moya lived together for years. He considered Moya to be his wife, although they were never married. They rarely argued and never hit each other. Garcia typically worked nights as a cook. Approximately six months before the murder, Moya began going

out in the evenings, sometimes not coming home until the early hours of the morning or the next day. She said she was going out with her girlfriends, and he trusted her. He felt sad when she went out with her friends without him.

On the morning of May 29, 2017, when Moya came in, Garcia heard her tell D. she had been with her girlfriends. But when Moya entered the house, Garcia realized she had been going out with another man, because she had “fixed herself up,” was wearing makeup and new clothes, and seemed happy. He “was blinded” and “just couldn’t see anything.” He felt “very bad, very sad,” like a “loser,” and as if “everything was crumbling down.” However, his realization that Moya was seeing someone else did not make him feel like he “wanted to do something to her.”

Garcia did not know why he killed Moya; it was “in the moment” and he “couldn’t see anything.” His vision became blurry, he could not hear anything or anyone, and he did not know what was happening. He did not remember getting the knife and did not know how many times he stabbed Moya. When he felt someone pulling him from behind he recovered his sight and realized Moya was on the ground. Prior to May 29, 2017, he had not considered killing Moya, and he did not think about killing her while he was sitting in the living room with D. that morning. He did not plan an attack on her, and did not intend or want to kill her.

2. Procedure

A jury convicted Garcia of first degree murder (Pen. Code, § 187, subd. (a)),² and found true the allegation he personally

² All further undesignated statutory references are to the Penal Code.

used a deadly and dangerous weapon, a knife, in commission of the offense. (§ 12022, subd. (b)(1).) The trial court sentenced him to 25 years to life for the murder, plus one year for the weapon enhancement. It imposed a \$10,000 restitution fine, a suspended parole revocation restitution fine in the same amount, a \$40 court operations assessment (§ 1465.8, subd. (a)(1)), a \$30 criminal conviction assessment (Gov. Code, § 70373), and a \$500 domestic violence fund fee (§ 1203.097). Garcia stipulated to victim restitution in the amount of \$13,494. He timely appealed.

DISCUSSION

1. *The evidence was sufficient to prove premeditation and deliberation*

Garcia contends the evidence was insufficient to prove the premeditation and deliberation necessary to establish first degree murder. We disagree.

a. *Applicable legal principles*

When determining whether the evidence was sufficient to sustain a criminal conviction, “ ‘we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ ” (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1104; *People v. Salazar* (2016) 63 Cal.4th 214, 242.) We presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Medina* (2009) 46 Cal.4th 913, 919.) Reversal is not warranted unless it appears “ ‘that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].’ ” (*People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v.*

Penunuri (2018) 5 Cal.5th 126, 142.) The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence. (*People v. Salazar*, at p. 242.) We must accept logical inferences the trier of fact might have drawn from the evidence. (*Ibid.*)

Murder is of the first degree when it is willful, deliberate and premeditated. (§ 189; *People v. Elmore* (2014) 59 Cal.4th 121, 133.) Premeditation and deliberation require more than a showing of intent to kill. (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1069.) An intentional killing is premeditated and deliberate if it is considered beforehand and occurred as the result of preexisting thought and reflection, rather than as the product of an unconsidered or rash impulse. (*People v. Pearson* (2013) 56 Cal.4th 393, 443; *People v. Burney* (2009) 47 Cal.4th 203, 235.) “Deliberation” refers to careful weighing of considerations in forming a course of action; “premeditation” means thought over in advance. (*People v. Pearson*, at p. 443; *People v. Williams* (2018) 23 Cal.App.5th 396, 409; *People v. Disa* (2016) 1 Cal.App.5th 654, 664.) However, to prove a killing was premeditated and deliberate, it is “ ‘not . . . necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act.’ [Citation.]” (*People v. Disa*, at p. 665.) The “ ‘ “process of premeditation and deliberation does not require any extended period of time.” ’ ” (*People v. Salazar*, *supra*, 63 Cal.4th at p. 245.) “ ‘ “The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly’ [Citations.]” [Citation.]’ ” (*People v. Houston* (2012) 54 Cal.4th 1186, 1216.)

A reviewing court typically considers three categories of evidence when determining whether a finding of premeditation and deliberation is adequately supported: planning activity, motive, and manner of killing. (*People v. Houston*, *supra*, 54 Cal.4th at p. 1216; *People v. Anderson* (1968) 70 Cal.2d 15, 26–27; *People v. Gonzalez* (2012) 54 Cal.4th 643, 663–664.) These so-called *Anderson* factors are not all required and are not exclusive, but are a framework to guide the assessment of the evidence. (*People v. Gonzalez*, at p. 663; *People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 294; *People v. Solomon* (2010) 49 Cal.4th 792, 812.) Where there is evidence of all three factors, a first degree murder verdict is typically sustained. (*People v. Sandoval* (2015) 62 Cal.4th 394, 424–425; *People v. Williams*, *supra*, 23 Cal.App.5th at p. 409.)

b. *The evidence was sufficient*

Here, there was evidence of all three *Anderson* factors. First, there was evidence of motive. The relationship between Garcia and Moya had soured; they no longer slept in the same room and sometimes argued. Garcia admittedly felt sad when Moya went out with friends, leaving him behind. He believed she was seeing another man, which made him feel like a “loser.” He and Moya had argued the evening prior to the murder, when Moya left the house to go out on just such an occasion. Thus, Garcia’s discontent over the state of their relationship provided a motive for the murder. (See *People v. Kovacich* (2011) 201 Cal.App.4th 863, 893 [“evidence showing ‘quarrels, antagonism or enmity between an accused and the victim of a violent offense is proof of motive to commit the offense’ ”]; *People v. Disa*, *supra*, 1 Cal.App.5th at p. 666 [motive for killing shown by evidence defendant was depressed about the end of his relationship with

the victim, was angry at her, and was jealous of her relationship with another]; *People v. Nazeri* (2010) 187 Cal.App.4th 1101, 1117 [evidence of sexual jealousy was one of several motives for killing]; *People v. Williams, supra*, 23 Cal.App.5th at p. 410 [defendant’s “rage at the collapse of” his marriage to the victim provided evidence of motive].)

There was also evidence of planning, thought, and reflection. When Moya drove away on the night of May 28, 2017, Garcia remained outside in the shadows for an hour and a half, pacing and rocking back and forth. The next morning, he was observed in front of the house behind a truck. He also sat on the couch inside the house without engaging in significant activity for at least an hour before Moya returned home. The jury could reasonably infer that during these periods Garcia was brooding and contemplating whether to kill Moya. It could also infer he was watching and waiting for Moya to return home so he could commence his attack.³ “‘Lying in wait is the functional equivalent of proof of premeditation, deliberation, and intent to kill.’ [Citation.]” (*People v. Sandoval, supra*, 62 Cal.4th at p. 416; see *People v. Nazeri, supra*, 187 Cal.App.4th at pp. 1115–1117 [jury could infer planning from evidence that defendant had hours to ponder and brood about the perceived unfaithfulness of his wife].) When Moya arrived home, Garcia immediately attacked her. D. testified that his parents said nothing to each other before the attack. There was but a brief interval between the time Moya arrived home and Garcia fled in Moya’s car—only approximately six minutes. The fact Garcia wordlessly

³ Indeed, when denying Garcia’s section 1118.1 motion and at sentencing, the trial court observed that the evidence showed Garcia was lying in wait for Moya.

ambushed Moya so quickly strongly indicated a preplanned attack.

Moreover, the murder weapon was one of the knives the family normally kept in the kitchen. Thus, there were two possibilities: either Garcia had the knife concealed on his person while he waited for Moya to come home, or he made a trip to the kitchen and selected the knife as the murder weapon when she arrived. From either scenario, the jury could readily infer planning activity. (See *People v. Elliot* (2005) 37 Cal.4th 453, 471 [evidence defendant armed himself prior to the attack supported finding of planning activity]; *People v. Perez* (1992) 2 Cal.4th 1117, 1126 [planning activity shown by the fact defendant obtained a knife from the kitchen of the victim's home]; *People v. Thomas* (1992) 2 Cal.4th 489, 517 [planning shown by evidence from which jury could infer defendant returned to his car to get a rifle before committing murders]; *People v. Wharton* (1991) 53 Cal.3d 522, 547 [planning shown where the murder weapon was not found in its usual place, supporting inference defendant removed it ahead of time and placed it nearby]; *People v. Wright* (1985) 39 Cal.3d 576, 593, fn. 5 ["obtaining [a deadly weapon] in advance of a killing is one fact that has been held to support an inference of planning activity"]; *People v. Nazeri, supra*, 187 Cal.App.4th at pp. 1115–1117 [planning shown by fact defendant had murder weapon, which was normally kept upstairs, when he attacked the victim].) And, significantly, Garcia did not just grab any knife from the kitchen: he selected the *largest* of the seven knives the family kept there. His choice to use the most lethal of the weapons available to him further suggested a plan to kill.

Finally, the manner of killing indicated premeditation and deliberation. Without saying a word to Moya, Garcia ambushed

her from behind, stabbing her in the side. He then turned her around and stabbed her numerous times in vital areas. (See *People v. Prince* (2007) 40 Cal.4th 1179, 1253 [clustered stab wounds supported an inference of premeditation and deliberation]; *People v. Elliot, supra*, 37 Cal.4th at p. 471 [three potentially lethal knife wounds coupled with 80 other stab and slash wounds could show a preconceived design to kill]; *People v. Bolin, supra*, 18 Cal.4th at p. 332 [multiple gunshot wounds, several of which would have been fatal individually, supported finding of premeditation and deliberation]; *People v. San Nicolas* (2004) 34 Cal.4th 614, 658–659 [sheer number of wounds on victim’s body, many of which individually would have been fatal, supported a finding of deliberation]; *People v. Nazeri, supra*, 187 Cal.App.4th at p. 1118 [numerous wounds to neck and vital organs supported inference that the blows were intended to kill rather than wound].) Moreover, Garcia did not cease his attack despite Zamora’s three attempts to thwart him. The fact he continued to stab Moya despite multiple attempts to stop him tended to demonstrate a purposeful design to kill. In sum, there was ample evidence from which the jury could find premeditation and deliberation.

Garcia’s arguments do not persuade us otherwise. He contends there was conflicting evidence about his whereabouts the night before the murder and an innocent explanation for his presence in the driveway and on the couch before Moya arrived home, undercutting any inference he was considering murder during these periods. He argues he simply “flew into a rage” when he saw Moya return home and realized she had “not just been out with her girlfriends.” And, he suggests that if he had premeditated the killing, he would have done a better job

planning: he would not have carried it out in front of his son and other witnesses, and would have had a more effective escape plan in place.

These arguments amount to a request that this court reweigh the evidence and substitute our judgment for the jury's. This we cannot do. The fact the evidence might have been reconciled with a contrary finding does not warrant a reversal. (*People v. Harris* (2013) 57 Cal.4th 804, 849—850.) “ ‘ “Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence.” [Citation.]’ ” (*Id.* at p. 849; *People v. Cortes* (1999) 71 Cal.App.4th 62, 81 [where an appellant “merely reargues the evidence in a way more appropriate for trial than for appeal,” we are bound by the trier of fact’s determination].) Where, as here, the circumstances reasonably justify the jury’s findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding. (*People v. Solomon, supra*, 49 Cal.4th at p. 816.)

In any event, the “lack of evidence of extensive planning does not negate a finding of premeditation.” (*People v. Brady* (2010) 50 Cal.4th 547, 563.) Premeditation and deliberation can occur in a brief interval; the test is not time, but reflection. (*People v. Solomon, supra*, 49 Cal.4th at p. 812; *People v. Brady*, at p. 563.) There was little evidence that Garcia attacked Moya in the heat of passion. Neither D. nor Zamora testified to facts suggesting Garcia was enraged when he murdered Moya. No

argument or conversation preceded the stabbing. Garcia did not testify that he stabbed Moya in an explosion of rage. To the contrary, he testified that his realization she was purportedly seeing another man did not impel him to hurt her, and he did not know why he killed her. And, there is no requirement that the perpetrator have an elaborate or clever plan in place; ineptitude does not demonstrate the absence of premeditation and deliberation.

Nor are we persuaded that the manner of killing required a finding Garcia stabbed Moya in a frenzy, rather than in a premeditated attack. It is correct, of course, that a brutal stabbing may be as consistent with a sudden explosion of violence as with a calculated murder. (See *People v. Alcala* (1984) 36 Cal.3d 604, 626 [“The fact that a slaying was unusually brutal, or involved multiple wounds, cannot alone support a determination of premeditation. Absent other evidence, a brutal manner of killing is as consistent with a sudden, random ‘explosion’ of violence as with calculated murder”].) But *Alcala* does not hold that brutal murders are *necessarily* unpremeditated, only that the nature of the wounds alone may not suffice to prove premeditation. (See *People v. Williams, supra*, 23 Cal.App.5th at p. 410 [“The jury *could* have reasonably found that the victim’s injuries reflected an emotional, berserk attack . . . [b]ut it was permitted to find otherwise”]; *People v. San Nicolas, supra*, 34 Cal.4th at pp. 658–659 [even if nature of wounds suggests rage, “an inference of premeditation is not precluded”].) Here, as we have explained, there was considerable additional evidence establishing premeditation. There was no evidentiary deficit.

2. *Garcia has forfeited any challenge to the restitution fine and court fees*

In supplemental briefing, citing *People v. Dueñas* (2019) 30 Cal.App.5th 1157, Garcia asserts that we must stay execution of the restitution fine and reverse the court fees “unless and until” the People establish he has the present ability to pay them. But in the trial court, Garcia did not object to the assessments on the ground of an inability to pay. Section 1202.4, subdivision (d) allows a court to consider a defendant’s inability to pay if the restitution fine is more than the minimum fine of \$300. (*People v. Avila* (2009) 46 Cal.4th 680, 729 (*Avila*); § 1202.4, subds. (b)(1) & (d).) Although Garcia was sentenced before *Dueñas* was decided, he did not avail himself of this statutory remedy to challenge the imposition of the \$10,000 restitution fine. As the court imposed more than the minimum fine, Garcia was obligated to object to the amount of the fine and demonstrate his inability to pay anything more than the \$300 minimum. That objection would not have been futile under governing law at the time of his sentencing hearing. (§ 1202.4, subds. (c) & (d); see also *Avila*, at p. 729.) Contrary to Garcia’s argument, the issue of his ability to pay does not present a pure question of law that can be determined on appeal in the absence of an objection.

By failing to object that he lacked the ability to pay the \$10,000 restitution fine, Garcia has forfeited his challenge to that fine and the much lower court operations and conviction assessments. Garcia also has forfeited his contention that the court erred by failing to determine his ability to pay. (See *People v. Scott* (1994) 9 Cal.4th 331, 353 [waiver doctrine applies

to claims involving the court’s failure to make or articulate discretionary sentencing choices].)⁴

3. *The domestic violence fund fee must be stricken*

In addition to the aforementioned fines and assessments, the trial court imposed a \$500 domestic violence fund fee pursuant to section § 1203.097. In supplemental briefing requested by this court, the parties agree the fee must be stricken. The domestic violence fund fee authorized by section 1203.097, subdivision (a)(5)(A) may be imposed only when the defendant is granted probation for the crime. (§ 1203.097, subd. (a); *People v. Kirvin* (2014) 231 Cal.App.4th 1507, 1520.) Here, appellant was sentenced to prison, and imposition of the domestic violence fund fee was therefore unauthorized. An unauthorized sentence—one that cannot be lawfully imposed under any circumstances in the particular case—may be corrected on appeal despite the absence of an objection below. (*People v. Scott, supra*, 9 Cal.4th at p. 354 [in considering an unauthorized sentence, appellate courts will “intervene in the first instance because such error is ‘clear and correctable’ independent of any factual issues presented by the record at sentencing”]; *People v. Tua* (2018) 18 Cal.App.5th 1136, 1140; *People v. Williams* (2017) 7 Cal.App.5th 644, 696.) Accordingly, we order the domestic violence fund fee stricken.

⁴ Accordingly, we need not weigh in on the conflict among the cases decided after *Dueñas* addressing the forfeiture issue. (See, e.g., *People v. Castellano* (2019) 33 Cal.App.5th 485; *People v. Frandsen* (2019) 33 Cal.App.5th 1126; *People v. Bipialaka* (2019) 34 Cal.App.5th 455; *People v. Gutierrez* (2019) 35 Cal.App.5th 1027.)

DISPOSITION

The domestic violence fund fee of \$500 (§ 1203.097, subd. (a)(5)(A)) is stricken. The clerk of the superior court is directed to modify the abstract of judgment accordingly and to forward a corrected copy to the Department of Corrections and Rehabilitation. The judgment of conviction is otherwise affirmed.

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EDMON, P. J.

We concur:

LAVIN, J.

EGERTON, J.